C O M M O N W E A L T H O F M A S S A C H U S E T T S

H O U S I N G A P P E A L S C O M M I T T E E

WALL STREET DEVELOPMENT CORP.

v.

TOWN OF WALPOLE ZONING BOARD OF APPEALS

No. 2021-04

DECISION

February 28, 2024

TABLE OF CONTENTS

Counsel for Developer Wall Street Development Corp.
Jason R. Talerman, Esq.
Matthew D. Provencher, Esq.
Mead, Talerman & Costa LLC
730 Main Street, Suite 1F
Millis, MA 02054

Counsel for Town of Walpole Zoning Board of Appeals
George X. Pucci, Esq.
KP Law, P.C.
101 Arch Street, 12th Floor
Boston, MA 01220

Developer's Witnesses
William Scully, P.E.
Robert Truax, P.E.

Board's Witnesses
Patrick Deschenes
Kristin L. Morrison

C O M M O N W E A L T H O F M A S S A C H U S E T T S

H O U S I N G A P P E A L S C O M M I T T E E

WALL STREET DEVELOPMENT, CORP., Appellant,	)	
v.	)	No. 2021-04
TOWN OF WALPOLE ZONING BOARD OF APPEALS, Appellee.	)	

DECISION

I. INTRODUCTION AND PROCEDURAL HISTORY

This is an appeal pursuant to G.L. c. 40B, § 22 of a decision by the Walpole Zoning Board of Appeals (Board) denying a comprehensive permit to the appellant Wall Street Development Corporation (Wall Street or developer). On February 28, 2020, the developer applied to the Board for a comprehensive permit to build six structures containing 12 home ownership units, known as Diamond Hill Estates, on the westerly side of a 1.22-acre parcel located on Dupee Street in Walpole. Exh.1, pp. 1-2; Pre-Hearing Order, § II, ¶ 1. The Board opened the public hearing on the developer's application on March 18, 2020 and held 16 hearing sessions, closing the hearing on May 5, 2021. During the hearing before the Board, the developer revised the project to consist of eight single-family homes. On June 9, 2023, the Board voted to deny the comprehensive permit application. Pre-Hearing Order, § II, ¶ 11; Exh. 1, pp. 1-2.

The developer appealed to the Housing Appeals Committee (Committee) on June 23, 2021. Pre-Hearing Order, § II, ¶ 11; Exh. 1, p. 2. After the initial conference of counsel, the parties agreed to mediation and thereafter, on January 19, 2022, the presiding officer granted the parties' request for a remand to the Board for consideration of proposed changes to the project. On March 2, 2022, the Board reopened the public hearing on remand. Following the close of the

hearing on April 6, 2022, the Board voted to uphold its denial of the comprehensive permit. Pre-Hearing Order, § II, ¶¶ 12, 14, 16, 23; Exh. 1, pp. 3, 29. The developer appealed this decision to the Committee on April 21, 2022.

Following a status conference on May 3, 2022, the parties negotiated a pre-hearing order pursuant to 760 CMR 56.06(7)(d)(3), which the presiding officer issued on July 18, 2022. In advance of the hearing, the parties submitted pre-filed direct and rebuttal testimony of four witnesses.[1] A final pre-hearing status conference was held on December 5, 2022, and the parties filed a joint stipulation the same day agreeing there was no need for a hearing for the in-person cross-examination of witnesses. Fourteen exhibits were entered into evidence. On December 14, 2022, the presiding officer conducted a site visit. Both parties submitted post-hearing briefs, and the developer submitted a reply brief.

II. FACTUAL BACKGROUND

The parcel on which the project is located is in a Residence B (RB) zoning district and consists of approximately 1.22 acres. The site is relatively flat, varying from elevation 300 feet to the north to 307 feet to the south. There are no existing buildings or improvements on the development site. Pre-Hearing Order, § II, ¶¶ 1-4. It is bordered to the east and west by single-family residential neighborhoods on Cybil Street and Victoria Circle, which are parallel to Dupee Street and laid out similarly. Other surrounding developments also consist of single-family units.

The project now proposed consists of eight single-family houses, each with a two-car garage attached, and driveways connecting to Dupee Street, which is partially constructed. Dupee Street is a right of way approximately 28 feet in width and 880 feet in length. For the first 300 feet extending from its intersection with High Plain Street (state Route 27), Dupee Street consists of a gravel roadway on which two single-family homes are located; this portion is maintained by the Town. The remaining 580 feet of Dupee Street, which connects to Summit

[1] Before the hearing, the developer filed motions to strike portions of the prefiled testimony of the Board's witnesses, Patrick Deschenes and Kristin L. Morrison, on the ground they constituted unqualified opinion testimony. The presiding officer denied the motion, stating the Committee generally is reluctant to strike testimony unless its inclusion would be prejudicial. Order on Appellant's Motions to Strike, p. 3, citing G.L. c. 30A, § 11(a); *383 Washington Street, LLC v. Braintree*, No. 2020-04, slip op. at 5 (Mass. Housing Appeals Comm. Mar. 15, 2022). She determined the challenged testimony was not prejudicial, noting its credibility, relevance, and weight could be challenged and considered during any cross-examination at the hearing and in post-hearing briefing.

Avenue, has yet to be constructed. The proposed roadway construction serving the project will be approximately 20 feet in width, and the developer proposes to repave the entire roadway to High Plain Street. Pre-Hearing Order, § II ¶¶ 8, 9. The yet-to-be constructed portion of the street, where the parcel is located, intersects with Summit Avenue, which is perpendicular to it and is a similar residential street. The developer proposes to construct a circular cul-de-sac turnaround at the end of Dupee Street. *Id*., § II, ¶¶ 2, 8-9; Exhs. 3; 10, ¶¶ 19, 25-28; 10-V.[2]

III. STANDARD OF REVIEW AND DEVELOPER'S BURDEN OF PROOF

A. Developer's Case

On an appeal of a denial of a comprehensive permit, the ultimate question before the Committee is whether the board's decision is consistent with local needs. Under the comprehensive permit regulations, the developer "may establish a *prima facie* case by proving, with respect to only those aspects of the Project which are in dispute (which shall be limited), in the case of a Pre-Hearing order, to contested issues identified in the pre-hearing order that its proposal complies with federal or state statutes or regulations or with generally recognized standards as to matters of health, safety, the environment, design, open space, or other matters of Local Concern." 760 CMR 56.07(2)(a)2. *See 104 Stony Brook, LLC v. Weston,* No. 2017-14, slip op. at 11 (Mass. Housing Appeals Comm. June 22, 2023), *appeal docketed*, No. 2381-CV-02120 (Mass. Super. Ct. July 21, 2023, 2023); *383 Washington Street, LLC. v. Braintree*, No. 2020-04, slip op. at 5-6 (Mass. Housing Appeals Comm. Mar. 15, 2022) *aff'd,* No. 2282-CV-00345 (Mass. Super. Ct. May 14, 2023), *appeal docketed,* No. 2023-P-1213 (Mass. App. Ct. Oct. 18, 2023). Alternatively, a developer "may prove that Local Requirements and Regulations have not been applied as equally as possible to subsidized and unsubsidized housing." 760 CMR 56.07(2)(a)4. *See Warren Place, LLC v. Quincy,* No. 2017-10 (Mass. Housing Appeals Comm. Summary

[2] The current proposal replaces an earlier proposed hammerhead turnaround with a circular cul-de-sac turnaround and the developer proposes to relocate a utility pole at the intersection of High Plain Street and Dupee Street. *Id*., § II, ¶ 8; Exhs. 3; 10, ¶¶ 19, 25-28; 10-V. The original project proposal consisted of 16 townhouse-style units in 8 duplex buildings, with an improved Dupee Street connection to Summit Avenue. Exh. 2; Exh. 10, ¶ 9. This was subsequently revised to reduce the number of townhouse units to 12, eliminate the connection to Summit Avenue, and provide for a hammerhead turnaround. Exh. 10-IV. After several meetings with the Board on the earlier 16 and 12-unit plans, the developer ultimately revised the project again to reduce the number of units to eight.

Decision and Directed Decision Aug. 17, 2018) *aff'd*, No. 1882-CV-01167 (Mass. Super. Ct. Oct. 16, 2019). Wall Street has sought to challenge the Board's decision on both grounds.

B. Board's Case

Committee decisions have stated that in the case of a denial of a comprehensive permit, if the developer establishes a prima facie case, the burden shifts to the Board to prove a valid local concern that supports the denial. 760 CMR 56.07(2)(b)2; *see Braintree, supra*, No. 2020-04, slip op. at 6, citing *Hanover R.S. Limited P'ship v. Andover*, No. 2012-04, slip op. at 5 (Mass. Housing Appeals Comm. Feb 10, 2014); *Sugarbush Meadow, LLC v. Sunderland*, No. 2008-02, slip op. at 5 (Mass. Housing Appeals Comm. June 21, 2010), *aff'd* 464 Mass. 166 (Mass. 2013). The Board must also prove that the local concern outweighs the need for affordable housing. 760 CMR 56.07(2)(b)3. The burden on the Board is significant: the fact that Walpole does not meet the statutory minima regarding affordable housing establishes a rebuttable presumption that a substantial regional housing need outweighs the local concerns in this instance. 760 CMR 56.07(3)(a); G.L. c. 40B, §§ 20, 23. *See Zoning Bd. of Appeals of Lunenburg v. Housing Appeals Comm*., 464 Mass. 38, 42 (2013) ("there is a rebuttable presumption that there is a substantial Housing Need which outweighs Local Concerns" if statutory minima are not met), quoting *Boothroyd v. Zoning Bd. of Appeals of Amherst*, 449 Mass. 333, 340 (2007), quoting *Board of Appeals of Hanover v. Housing Appeals Comm*., 363 Mass. 339, 367 (1973) ("municipality's failure to meet its minimum [affordable] housing obligations as defined in [G.L. c. 40B,] § 20 will provide compelling evidence that the regional need for housing does in fact outweigh the objections to the proposal"). The developer may then rebut the Board's case by proving that "preventative or corrective measures have been proposed which will mitigate the Local Concern, or that there is an alternative means of protecting Local Concerns which makes the project economic." 760 CMR 56.07(2)(c).

The Board carries the burden to prove a local concern protected by a provision of Walpole's local requirements or regulations, and if state or federal law applies, it must show that the local requirement or regulation is more stringent than the applicable state or federal requirement. 760 CMR 56.02: *Local Requirements and Regulations* (defined as provisions that "are more restrictive than state requirements"); *see also Zoning Board of Appeals of Holliston v. Housing Appeals Comm.,* 80 Mass. App. Ct. 406, 417, 420 (2011), *F.A.R. den*., 460 Mass. 1116 (2011). Not only must a board show there is a more restrictive local requirement or regulation,

but it must also show that the local rule protects against a specific harm against which state and federal requirements do not. *Weston, supra,* No. 2017-14, slip op. at 16-17, citing *Holliston,* 80 Mass. App. Ct., 406, 417; *see* 760 CMR 56.02: *Local Requirements and Regulations. See also Herring Brook Meadow, LLC v. Scituate*, No. 2007-15, slip op. at 25 (Mass. Housing Appeals Comm. May 26, 2010) (board must show local bylaw or regulation applies to proposed development and "that the specific interests identified in [the local rule] are important at the site"). In essence, the harm the stricter local provision protects against must be a concern caused by the project, and not protected by state or federal law. *See Holliston,* 80 Mass. App. Ct. 406, 420.

If the Board has not articulated the local concern, nor shown its relationship to a specific applicable local requirement, nor demonstrated the relevant harm from the proposed development arising from failure to follow the local requirement, the Board has failed to demonstrate a valid local concern applicable to the project, much less that such a concern outweighs the need for affordable housing. *Holliston,* 80 Mass. App. Ct. 406, 417, 420; *Scituate, supra,* No. 2007-15, slip op. at 23-26.

IV. DEVELOPER'S *PRIMA FACIE* CASE

We have ruled consistently that a developer need only make a minimal showing for its prima facie case. *Weston, supra*, No. 2017-14, slip op. at 12, citing *100 Burrill Street, LLC. v. Swampscott*, No. 2005-21, slip op. at 7 (Mass. Housing Appeals Comm. June 9, 2008), quoting *Canton Housing Authority v. Canton*, No. 1991-12, slip op. at 8 (Mass. Housing Appeals Comm. July 28, 1993) ("[a] *prima facie* case may be established with a minimum of evidence"). For example, "it may suffice for the developer to simply introduce professionally drawn plans and specifications." *Sunderland*, *supra*, No. 2008-02, slip op. at 5 n.4, quoting *Tetiquet River Village, Inc. v. Raynham*, No. 1988-31, slip op. at 9 (Mass. Housing Appeals Comm. Mar. 20, 1991). "[E]xpert testimony directly addressing the matter in issue is more than sufficient to establish the developer's prima facie case." *Weston, supra*, No. 2017-14, quoting *Sunderland*, *supra*, No. 2008-02, slip op. at 9. Further, the Appeals Court has confirmed that "[i]t has long been held that it is unreasonable for a board to withhold approval of an application for a comprehensive permit when it could condition approval on the tendering of a suitable plan that would comply with State standards." *Weston,* No. 2017-14, *supra*, quoting *Holliston,* 80 Mass. App. Ct. 406, 416.

As we stated in *Weston*, a prima facie case is a term of art, and is not intended to require a developer to provide proof of compliance with every applicable federal or state statute, regulation or guideline to demonstrate it could meet a burden of ultimate persuasion of compliance with all state and federal requirements, as would occur if it bore the ultimate burden of proof of the issue in this appeal. A demonstration by the developer that it is making a conscientious effort to address them that includes evidence of its intent to comply with state and federal law, as well as generally accepted standards, is sufficient. Rather, the matters on which § 56.07(2)(a)2 states the developer may establish a *prima facie* showing—general compliance with state or federal requirements or generally accepted standards—are not ones on which it has the ultimate burden of proof before the Committee, since the Committee has neither the responsibility nor the authority to finally determine such compliance. *Weston, supra*, No. 2017-14, slip op. at 13, citing *Hanover,* 363 Mass. 339, 379; *Board of Appeals of North Andover v. Housing Appeals Comm*., 4 Mass. App. Ct. 676, 680 (1976) (stating "…nothing in [G.L. c. 40B, §§ 20-23] or in [*Hanover*, 363 Mass. 339] … suggests that the Housing Appeals Committee has been empowered with authority to override or ignore laws passed by the Legislature or regulations validly promulgated by the Commonwealth's various boards, departments, agencies or commissions"). The case is a burden of production: to introduce "evidence sufficient to form a reasonable basis for a [decision] in that party's favor." *Tiffany Hill, Inc. v. Norwell*, No. 2004-15, slip op. at 6 (Mass. Housing Appeals Comm. Sept. 18, 2007) (internal citations omitted).

Our longstanding interpretation that the regulation requires a minimum showing serves the purpose of having the developer provide sufficient information to allow the Board to make its local concerns case. *Weston, supra,* No. 2017-14, slip op. at 14, citing *Tetiquet River, supra*, No. 1988-31, slip op. at 11. "[E]ven where plans were incomplete, a developer that proposed to modify its plans to comply with State and Federal statutes or regulations had established a *prima facie* case." *Zoning Bd. of Appeals of Woburn v. Housing Appeals Comm.*, 92 Mass. App. Ct. 1115 (2017) (Rule 1:28 decision), citing *Holliston,* 80 Mass. App. Ct. 406, 416.

Moreover, in cases in which a developer may not have correctly addressed every aspect of compliance with state or federal requirements, we have emphasized that "the requirement … is for a preliminary presentation [and] where it is possible to improve the presentation and satisfy the Board's objections by a condition in the comprehensive permit, we will include it." *Weston*, *supra*, No. 2017-14, slip op. at 15, citing *Billerica Development Co. v. Billerica*, No. 1987-23,

slip op. at 34-35 (Mass. Housing Appeals Comm. Jan. 23, 1992) (where board attacked drainage report that was "the cornerstone of the presentation, on the ground that it contains errors and faulty assumptions" Committee resolved question with condition in its decision). *See also Tetiquet River, supra*, No. 1988-31, slip. op. at 3, 5-6 (if there is question about sufficiency of developer's submission, Committee may address issue by attaching condition to address it). Conditions such as those in *Billerica* and *Tetiquet River* may include a requirement that approval of a comprehensive permit is subject to compliance with applicable federal and state requirements.

We consider the developer's prima facie case based solely on evidence supplied by the developer; here, the pre-filed testimony and exhibits the developer submitted. *Weston, supra,* No. 2017-14*,* slip op. at 15, citing *Tiffany Hill, supra*, No. 2004-15, slip op. at 3, 6. In the Pre-Hearing Order, the parties agreed the local concerns at issue in this matter are limited to four issues: 1) emergency access to the project; 2) parking and snow removal; 3) recreational and open space; and 4) the project's compatibility with the surrounding neighborhood. Pre-Hearing Order, § IV, ¶ 3. The developer argues it has met its prima facie case based on the testimony of expert witnesses Robert Truax, P.E, and William J. Scully, P.E. Exhs. 10; 11; Developer brief, pp. 28-32.[3] As further discussed below, the developer's evidence demonstrates that it has provided detailed project plans, including emergency access plans, and that it addressed, and has shown it will comply with applicable state and federal requirements and generally accepted standards.

[3] The Board in its post-hearing brief asserts that the developer fails to make "a prima facie showing that its proposal complies with federal or state law, or other generally accepted industry standards, relative to emergency access, density, and open space issues." Board brief, p. 7. The Board does not provide further argument other than this statement. Such a generalized statement is not adequate to preserve an argument on this issue; therefore, the Board has waived any claim that the developer failed to establish a prima facie case. *See Falmouth Hospitality, LLC v. Falmouth,* No. 2017-11, slip op. at 38 (Mass. Housing Appeals Comm. May 15, 2020), citing *Oceanside Village, LLC v. Scituate*, No. 2005-03, slip op. at 33 (Mass. Housing Appeals Comm. July 17, 2007); *White Barn Lane, LLC v. Norwell*, No. 2008-05, op. at 31 (Mass. Housing Appeals Comm. July 18, 2011); *Washington Green Dev., LLC v. Groton*, No. 2004-09, slip op. at 3 n.2 (Mass. Housing Appeals Comm. Sept. 20, 2005); *An-Co, Inc. v. Haverhill*, No. 1990-11, slip op. at 19 (Mass. Housing Appeals Comm. June 28, 1994); *Okoli v. Okoli*, 81 Mass. App. Ct. 371, 378 (2010), citing *Lolos v. Berlin*, 338 Mass. 10, 14 (1958) (right of party to have point considered entails duty to provide assistance with argument and appropriate citation of authority); *Cameron v. Carelli*, 39 Mass. App. Ct. 81, 85 (1995).

A. Emergency Access

Mr. Truax, retained by the developer to perform engineering services, created the single family plan now under consideration. Exh. 10, ¶¶ 1, 4, 19. He worked with the developer's traffic consultant, Mr. Scully, to create fire apparatus turning movement plans (Turning Movement Plans) demonstrating the turning capabilities of various Town fire department trucks within the site. Exhs. 10, ¶ 21; 10-VI. Mr. Truax has more than 35 years of experience with GLM Engineering Consultants, Inc., which provides a range of services in land surveying, civil engineering, and environmental consulting. Exh. 10, ¶¶ 1-2. Mr. Scully has more than 40 years of experience in areas including, but not limited to, traffic analysis, safety planning, transportation, and parking. Exh. 11, ¶¶ 1-2.

In his pre-filed testimony, Mr. Truax refers to two memoranda prepared by Tetra Tech, the Board's peer reviewing firm, which demonstrate the project has met applicable requirements and guidelines relating to emergency access. The first is a February 22, 2021, memorandum prepared by Tetra Tech for the Board following its review of the Single Family Plan and responses provided by the developer to the firm's previous submittals. Exhs. 10, ¶ 25; 10-VII (Tetra Tech Final Review). The Tetra Tech Final Review states the proposed 20-foot wide Dupee Street roadway meets the "minimum width requirements for emergency access." Exh. 10-VII, p. 3.

The second Tetra Tech memorandum is dated December 30, 2021, after the firm's review of the Turning Movement Plans and pole relocation. Exhs. 10, ¶ 31; 10-IX (Second Tetra Tech Memo). This memorandum further stated the proposed project design meets applicable Massachusetts Department of Transportation (MassDOT) intersection design guidelines, and "[g]iven the project meets this MassDOT typical standard it can be reasonably inferred that associated emergency access is acceptable." *Id.*

Mr. Scully also testified that the Turning Movement Plans show all emergency fire vehicles and apparatus were able to satisfactorily perform a turn in the cul-de-sac. Exh. 11, ¶ 25. The Tetra Tech Final Review noted that while the cul-de-sac was smaller than otherwise required by local zoning regulations, the peer review recommended any decision include a condition that the cul-de-sac diameter be approved by the fire department, with final plans showing unobstructed emergency vehicle travel paths in and out of the project site, and further marked this comment as "resolved." Exh. 10, p. 6. Regarding the turn onto Dupee Street, Mr. Truax

further testified that the Turning Movement Plans showed that the right-turn ingress and access onto Dupee Street was more than adequate for the pumper truck, while the ladder truck encroached the opposing lane of High Plain Street by less than one foot. Exhs. 11, ¶¶ 25, 26; 11-V, VII; 12, ¶ 13. Specifically, he stated a ladder truck entering and exiting Dupee Street with a right turning movement would encroach the center line by nine inches for less than 36 feet. *Id*. According to Mr. Scully, small, short encroachments of large vehicles on centerlines of cross streets, while turning, are accepted maneuvering practices, given the limited rights of way and other considerations typically existing in as-built environments, and as stated in the MassDOT Project Development and Design Guide (Mass DOT Guidelines). Exhs. 11, ¶ 27; 11-VII.[4] He stated the Second Tetra Tech Memo specifically referred to the Massachusetts Emergency Vehicle Law, which requires drivers to pull over as far as possible to the right at the approach of an emergency vehicle and to stop, as a basis for its determination that the developer's plans provide reasonable accommodation for responding emergency vehicles. Exhs. 11, ¶ 34; 11-X.[5]

The governing regulations for fire safety in Massachusetts are contained within the Massachusetts Comprehensive Fire Safety Code, 527 CMR 1.00, *et seq*., which adopts and incorporates portions of the National Fire Protection Association code (NFPA 1). *See HD/MW Randolph Avenue, LLC v. Milton*, No. 2015-03, slip op. at 20, n.10 (Mass. Housing Appeals Comm. Dec. 20, 2018); *Braintree*, *supra*, No. 2020-04, slip op. at 7, n.5. Section 1.05 of 527 CMR provides certain modifications to the NFPA 1 on a chapter by chapter basis. Section 16.13.3.1 of the NFPA 1, as adopted by 527 CMR 1.05, states that "[e]very building shall be accessible by fire department apparatus by means of roadways … of not less than 6.1 m (20 ft.) of unobstructed width….," and Section 16.13.3.4 states the width of access roadways "shall not

[4] An excerpt of the MassDOT Guidelines, certain pages from Chapter 6 titled "Intersection Design," was admitted into evidence as Exhibit VII to Mr. Scully's prefiled testimony.

[5] The Tetra Tech December 31 Memorandum states that "Emergency Vehicle Encroachment is relatively small—Turning figures…indicate the [ladder truck] will encroach less than one (1) foot into the opposing land leaving adequate space for a vehicle traveling in the opposite lane to continue with only a slight, if any, modification of its speed or path of travel, despite Massachusetts emergency vehicle yielding requirements. Vehicles traveling in [encroached areas] are expected to pull over—We assume that under responding conditions…emergency siren and beacons will be in use clearly warning traffic in all lanes of its approach. Massachusetts Emergency Vehicle law requires drivers to pull over as far as possible to the right-side curb at the approach of an emergency vehicle and stop. There is more than 11 feet of available width remaining in the opposing lane and several hundred feet of clear sit line to accommodate the required response." Exhs. 11-X; 11, ¶ 34.

be obstructed in any manner, including obstruction by parked vehicles." 527 CMR 1.05, § 16.13.3.4. However, the plans prepared by the developer, and the testimony by Mr. Scully, that Dupee Street will have a paved width of 20 feet show that Dupee Street will be paved and meet the minimum width requirement. Exhs. 5; 11, ¶¶ 14, 38; 12, ¶ 15.

The developer provided expert testimony through Mr. Truax and Mr. Scully directly addressing the emergency access issue and relying on general standards as well as MassDOT Guidelines and state motor vehicle law. Their testimony was accompanied by detailed professional plans showing elements such as the turning radii onto Dupee Street and the width of the proposed roadway. The developer has also submitted documentation prepared by Tetra Tech, referenced by Mr. Truax and Mr. Scully in their prefiled testimony, that acknowledged the new proposed emergency access complies with acceptable standards and requirements. Exhs. 10, ¶ 31; 10-VII; 10-IX. The developer's expert testimony and exhibits therefore are sufficient to establish its prima facie case of compliance with state or federal statutes or generally accepted standards with respect to emergency access. *See, e.g., Braintree*, *supra*, No. 2020-04, slip op. at 7, citing *Sunderland, supra,* No. 2008-02*,* slip op. at 9; *Swampscott*, *supra*, No., 2005-21, slip op. at 7 (stating expert testimony is more than enough to establish prima facie case).

B. Snow Removal and Parking

Mr. Truax testified that each of the eight single-family units will have four off-street parking spaces. Exh. 10, ¶ 19; Developer brief, p. 7. He also referred to the Tetra Tech Final Review which stated, with regard to on-street parking, that the firm recommended any decision "include a condition that on-street parking or any other storage/staging within the roadway be precluded," and marked the comment as "resolved." Exh. 10-VII, p. 3. It also noted that two visitor parking spaces were shown on the site plans in a location that met minimum requirements and did not impede emergency access. Exh. 10-VII, p. 7.

Mr. Truax also testified that the project's revised plans show adequate areas for snow storage. Exh. 10, ¶ 25. He testified that "the subsequent revised Single-Family Plans included adequate provisions for snow storage on the site," and that "all technical issues and comments raised by Tetra Tech had been resolved satisfactorily," which was acknowledged by Tetra Tech in its final letter to the Board dated February 22, 2021. Exh. 10, ¶ 25; *see also* Exh. 10-VII.

As shown by the memoranda in which the Board's peer reviewer and Town officials explicitly characterize the snow storage layout as "practical," and parking as meeting "minimum

requirements," the project meets generally accepted standards as to parking and snow storage. Exhs. 12-III (Department of Public Works (DPW) memo dated February 24, 2021 (DPW Memo), stating cul-de-sac layout is "practical" from snow removal perspective); 10-VII, pp.4, 7 (Tetra Tech Final Review, noting driveway depths are sufficient to accommodate parking and visitor spaces shown on plans meet minimum requirements). Also, the Town's own engineering memorandum states the layout appears practical for snow removal. Exh. 12-III, p. 1. Accordingly, the developer has met its prima facie case with respect to parking and snow removal.

C. Open Space and Recreational Space

The developer does not dispute the Board's claim that no explicitly demarcated recreational amenities are on site. Developer brief, p. 31. Its witnesses testified that if residents wish to use open or recreational space, options are available near the project. Specifically, Mr. Truax testified that there are a variety of public parks and recreational areas nearby. For example, recreational amenities are located at an elementary school 0.5 miles from Dupee Street, and at a middle school 0.6 miles from Dupee Street. Additionally, recreational amenities adjacent to the Walpole Town Hall are 1.5 miles away, and Bird Park is 1.2 miles away. Exh. 10, ¶ 21.

Here, where the developer has submitted evidence regarding open space and recreation amenities near the project site, the developer has met its *prima facie* case as to compliance with generally accepted standards for open and recreational space. *See Autumnwood v. Sandwich Zoning Board of Appeals*, No. 2005-06, slip op. at 14 (Mass. Housing Appeals Comm. June 25, 2007) (stating close proximity to schools and open space a factor establishing developer's prima facie case that project complies with "generally recognized standards"). *See also Braintree*, *supra,* No. 2020-04, slip op. at 10 (finding developer has met *prima facie* case where it presented expert testimony no identifiable standard for outdoor recreational space existed, and that project complied with generally accepted design standards).

D. Compatibility with Neighborhood

On the fourth and final matter of local concern, Mr. Truax testified that the developer responded to the Board's initial concerns regarding the surrounding neighborhood by revising the project from attached townhomes to detached single-family dwellings. He testified that nearly all of the surrounding neighborhood, including the existing three homes on Dupee Street, has been developed with single-family homes, consistent with the residential use permitted in

this zone. Exh. 10, ¶¶ 5, 6, 20; Developer brief, p. 32. Mr. Truax further testified that the proposed plan for eight single-family units was a design "more consistent with the single-family character of the surrounding neighborhood, enhanced current conditions, reduced density, improved off-street parking…." Exh. 10, ¶ 20. The plan "conform[s] to the predominant development patterns in the area…." Exh. 10, ¶ 22. The proposed homes are "consistent with and comparable in size to the existing dwellings existing on Dupee Street…." Exh. 10, ¶ 23. This testimony is sufficient to establish the developer's *prima facie* case. The project is consistent with the surrounding area and will be in line with the environment as it exists.

The developer has made its *prima facie* case on the issue of neighborhood compatibility. The proposed project consists of single-family homes. The developer's witness testimony has established that the surrounding area is made up of single-family home developments, which was also demonstrated during the site view of the project, and that the proposed project is consistent with and complies with the type of residential use allowed in this district. *See Braintree, supra*, No. 2020-04, slip op. at 10 (stating *prima facie* case burden met when developer could identify no specific standard but provided evidence project complied with generally accepted standards).

V. LOCAL CONCERNS

Since the developer has made its *prima facie* case, the Board must prove a valid local concern that supports the denial of the comprehensive permit, and that such local concern outweighs the regional need for affordable housing. 760 CMR 56.07(1)(c), 56.07(2)(b)3. The Board argues it has demonstrated valid local concerns relating to emergency access, snow removal and parking, open and recreational space, and compatibility with the surrounding neighborhood. Board brief, pp. 7-14. In support, the Board submitted prefiled testimony from two witnesses, Patrick Deschenes, Walpole's Community and Economic Development Director, and Kristin L. Morrison, a Dupee Street resident and abutter to the project.

A. Emergency Access

The Board raises concerns about the ability of the Town's fire department vehicles to safely maneuver within the cul-de-sac turnaround, as well as their ability to turn onto Dupee Street from High Plain Street. Exh. 10, ¶¶ 20, 24. The Board focuses primarily on the width of the proposed access road and the turning ingress and egress onto Dupee Street from High Plain Street (Route 27). Its witness, Mr. Deschenes, testified that the 20-foot width of the proposed access road, rather than 26 feet, which is required under the Town's Subdivision Rules and

Regulations, will require a ladder truck to cross over the center line when making a right turn. Exh. 13, ¶ 9; Board brief, p. 9.[6] He stated that the ladder truck would cross the center line on Route 27 into oncoming traffic when making a right turn on to Dupee Street arriving from the direction of the fire station, and stated this was "exacerbated by the fact that Route 27 is heavily traveled roadway during peak hours, with cars and trucks traveling to and from Route 1, with connections to interstate highways to points north and south." Exh. 13, ¶ 9. He also stated that, although the proposed relocation of the utility pole at the intersection of Dupee Street and High Plain Street would reduce the extent to which the ladder truck would cross the center line, he believed it still would pose a sufficient safety risk. He suggested the hazard of "crossing into the oncoming traffic land when making a right turn onto Dupee Street would likely be the case for other trucks as well, such as furniture or appliance delivery trucks, construction vehicles, Federal Express, or other truck deliveries." Exh 13, ¶ 10. The Board argues that, even though Tetra Tech viewed the pole relocation to be an improvement, the crossing of emergency vehicles over the centerline into oncoming traffic is a safety risk the Board should not accept. Board brief, p. 4; Exh. 13, ¶¶ 8-9.

Mr. Deschenes also testified the width of Dupee Street would leave no room for emergency vehicles to pass if other vehicles are parked along Dupee Street, stating that even if parking on Dupee Street is prohibited, it will not guarantee that vehicles will not park on the roadway occasionally, causing problems for emergency vehicle passage. Exh. 13, ¶ 11. The Board argues the Town will be unable to enforce any illegal parking violations because the gravel way of Dupee Street is private, the Town's parking enforcement authority is limited, and it would require private enforcement and signage to maintain. In the event an illegally parked vehicle is on Dupee Street during an emergency, the Board argues, this could impede access for emergency vehicles. Board brief, pp. 3, 9.

The Board further argues that the National Fire Protection Code, as codified in part at 527 CMR 1.05, requires a developer to have an unobstructed access road no less than 20 feet wide. Board brief, p. 8. It notes the developer must comply with these state fire code requirements,

---

[6] We note, as set forth in the Pre-Hearing Order, this project does not involve a subdivision of land. *See* Pre-Hearing Order, § IV.4.a. In this instance, waivers from subdivision requirements are not required, although a Board may look to subdivision standards as guidance for project conditions. *See* 760 CMR 56.05(7). In any event, the Town's subdivision rules and regulations have not been introduced as an exhibit and we do not consider them.

because the Committee may not waive state requirements. *See Milton, supra*, No. 2015-03, slip op. at 23.[7]

The developer argues the Board has failed to prove a valid local concern relating to emergency access, asserting Mr. Deschenes' testimony was not based on relevant expertise. It asserts that the Board's witnesses are not fire protection, safety, or code experts "of any kind." Developer brief, p. 32; Developer reply brief, p. 9. On the developer's behalf, Mr. Truax testified about the changes he and the developer's traffic consultant, Mr. Scully, implemented to the Single Family Plan to address the Board's concern regarding emergency access: Dupee Street would be reconstructed as a paved roadway with a width of 20 feet within a right-of-way of approximately 30 feet. The replacement of the earlier planned hammerhead turnaround with a circular cul-de-sac turnaround would enhance turning flexibility for emergency vehicles. Exh. 10, ¶¶ 1, 4, 19-21, 25-28.

The Turning Movement Plans developed by Mr. Truax and Mr. Scully demonstrated the turning capabilities of various Town fire department trucks within the proposed project site. Exhs. 10, ¶ 21 10-VI. Mr. Scully suggested the relocation of the utility pole on High Plain Street to improve the turning radius for emergency vehicles entering and existing Dupee Street. Exh. 11, ¶¶ 30, 31; *see also* Exh. 11-VIII. Mr. Truax prepared a revised plan showing the relocation of an existing utility pole at the intersection of Dupee Street and High Plain Street that would allow the proposed street intersection radius to be increased and flattened and allow better turning movements for fire department apparatus. Exhs. 10, ¶¶ 24-28; 10-VIII.

Mr. Truax testified that the Turning Movement Plans showed that both a Town fire department "pumper truck" and "ladder truck" were able to "maneuver comfortably within the paved circular cul-de-sac turnaround." Exh. 10, ¶ 21. He stated the Turning Movement Plans show the "right turn ingress and access in Dupee Street was more than adequate for the pumper truck, while the ladder truck briefly encroached the centerline of High Plain Street for a short

[7] While *Milton* noted that the state fire code requires a safe turning radius for emergency vehicles, and therefore the developer must comply with this requirement, *Milton, supra*, No. 2015-03, slip op. at 23, the Committee noted in that case, similar to the present case here, that the developer was not seeking a waiver of any specific provision of the state fire code, but was instead challenging the judgment of the fire chief. *Id*. The Committee in *Milton* ruled that the developer must include in its revised plans a vehicle turnaround sufficiently able to accommodate the town's largest emergency vehicle. *Id.* at 23-24. The Board in this matter may include a similar condition requiring final plans to be approved by the Fire Department.

distance." *Id.* He further testified that with the proposed relocation of the utility pole, the Town's largest ladder truck would encroach the centerline of High Plain Street by less than one foot. Exhs. 10, ¶ 28; 10-VII.

Mr. Scully also testified the project's proposed Dupee Street roadway will have a paved width of 20 feet, with a one-foot Cape Cod berm and three-foot grass shoulder on each side. Exh. 11, ¶¶ 14, 38; Exh. 12, ¶ 15; Board brief, p. 25. Dupee Street is currently a gravel roadway approximately 12 feet wide, and Mr. Scully stated the proposed changes will be significant improvements over the existing conditions. Exh. 11, ¶ 27.

As referenced above, the Second Tetra Tech Memo Tetra Tech's opinion "that the access arrangement proposed by [the developer] provides reasonable accommodation for responding emergency vehicles…." Exh. 10-IX. Additionally, the Tetra Tech Final Review memo stated that all technical issues and comments raised by Tetra Tech regarding the Single Family Plan had been resolved satisfactorily. Exh. 10, ¶ 25. Pursuant to this memo, the proposed 20-foot wide Dupee Street roadway meets the "minimum width requirements for emergency access," and "can accommodate emergency vehicles and allow cars to pass each other in opposing directions." Exh. 10-VII, p. 3.

The Board has not shown that Mr. Deschenes, while an expert in the field of planning, has expertise on the issue of emergency access. Importantly, it proffered Mr. Deschenes as a fact witness, not an expert, particularly not a fire protection, safety, or code expert.[8] Mr. Deschenes' testimony regarding emergency access safety hazards appears to be based on his experience as a planner, while including some fact testimony.[9] On this record, we find the testimony of the

---

[8] As noted above in § I, *supra*, the developer moved to strike a portion of Mr. Deschenes' testimony as exceeding the scope of a non-expert lay witness. The Board asserted it was not seeking to introduce expert testimony through this witness. Developer reply brief, p. 8; Board's Consolidated Opposition to Appellant's Motions to Strike, pp. 1-2 (stating "[w]ith respect to Deschenes, none of his testimony involves expert opinion concerning traffic counts, site lines, or other issues requiring expert engineering qualifications. His testimony is strictly limited to factual issues within his personal knowledge base based on his familiarity with the site in questions, on issues such as the width of the roadway, snow removal, and factual issues concerning site access. His testimony simply elaborates on factual issues already before this Committee…and is helpful in explaining and understanding the bases for the Board's denial.").

[9] We note that on this issue, as with the others it has raised, the Board has provided little evidence regarding local concerns, and we do not accord its testimony with much weight. [It did not provide expert testimony on matters typically benefitting from such expertise. Its witnesses were not proffered as experts but as fact witnesses. Indeed, Mr. Deschenes, while a municipal planner with significant experience in

developer's experts, Mr. Truax and Mr. Scully, to be more credible with regard to emergency access.

Second, the Board's emergency access issue focuses on a brief encroachment of the center line by one type of fire truck and alleged potential obstructions on Dupee Street from parking. The Board points to two standards it argues are applicable to the project and that the project fails to meet. The first standard is the Town's subdivision rules and regulations. Although, as set forth in the Pre-Hearing Order, this project does not involve a subdivision of land, the Board argues they "provide a standard benchmark" for roadway length and width." Pre-Hearing Order, § IV.4.a; Board brief, p. 9 ("the proposed…right of way are each smaller than the requirements contained within Walpole's Subdivision Rules and Regulations"). The second standard the Board points to is NFPA 1, as codified in 527 CMR 1.05. Board brief, p. 8. It argues that §§16.13.3.4 and 18.2.4.1.1 of the NPFA, as contained in the Massachusetts regulation, require access roads to have an unobstructed width of not less than 20 feet, and to not be obstructed in any manner, including by the parking of vehicles. The Board also argues that the state fire code requires a safe turning radius for emergency vehicles within the property site. Board brief, p. 8.[10]

However**,** as the developer points out, the 20-foot width of the proposed roadway meets state fire code requirements for roadway width. "What is critical is that the [fire] trucks be able to get into the development to protect life and property." *Spencer Livingstone Assoc. Ltd. P'ship v. Medfield*, No. 1990-01, slip op. at 12 (Mass. Housing Appeals Comm. June 12, 1991). Here,

---

planning, does not provide expert engineering testimony. Ms. Morrison, who testified regarding her experiences living on Dupee Street, is an abutter to the site. *See Norwell, supra*, No. 2004-15, slip op. at 28 (noting "on this sparse record" the Board has not adequately demonstrated a legitimate local concern).

[10] Neither the NFPA 1 nor 527 CMR 1.00, *et seq*., were entered into the record as an exhibit. However, we have routinely accepted relevant current Massachusetts state regulations as applicable law in our proceedings without their being introduced into evidence. *See* G.L. c. 30A, § 6 ("[t]he contents of the Massachusetts Register shall be judicially noticed and, without prejudice to any other mode of citation, may be cited by volume and page number."); *see also Commonwealth v. Bones*, 93 Mass. App. Ct. 681, 685 (2018), *rev. den.*, 480 Mass. 1109 (2018) (stating courts are required to take judicial notice of, among other things, the Code of Massachusetts Regulations); *Perini Corp v. Building Inspector of North Andover*, 7 Mass. App. Ct. 72, 78 n.10 (1979) (stating court can take notice of regulations accessible to it as a state publication); *Saxon Coffee Shop, Inc. v. Boston Licensing Board*, 380 Mass. 919, 926 (1980) (stating court permitted to take judicial notice only of regulations published in the Massachusetts Register). *See also* 760 CMR 56.06(8)(b)1 ("[o]fficial notice may be taken of such matters as might be judicially noticed by the courts of the United States….").

the evidence shows that the project is accessible by fire department equipment from High Plain Street onto Dupee Street and that the width of the roadway meets the state requirement. The Board does not deny that the project includes a proposed 20-foot roadway, but instead argues that the "proposed 20-foot roadway…[is] far smaller than the requirements contained within Walpole's Subdivision Rules and Regulations," which require a 26-foot wide roadway. *See* Board brief, p. 9.

As to potential emergency access obstructions created by on-street parking, the Board presented no evidence that the project would result in a greater risk of obstruction by a parked car on Dupee Street than there would be on any other roadway, caused by a double-parked delivery truck or other unforeseen occurrences, such as traffic accidents or construction. *See Braintree, supra*, No. 2020-04, slip op. at 13 (stating no evidence presented of greater risk of obstruction by parked car than could be on any other way); *see River Stone, LLC v. Hingham*, No. 2016-05, slip op at 48 (Mass. Housing Appeals Comm. Sept. 23, 2022) (ruling Board provided no evidence project would result in greater risk of obstruction by parked vehicles than any other random occurrence, such as traffic accident). As shown on the project plans, Dupee Street will be a two-lane wide street, and would not be obstructed unless vehicles park on both sides of the street in the same area. *See* Exhs. 2; 3. Further, the Board has the ability to address issues relating to alleged emergency access obstructions by ordering, through its local fire safety authorities, the installation of no parking signs, roadway surface markings, and other notices to inform residents and the public that obstruction along Dupee Street is prohibited or otherwise limited to prevent obstructions. *See Braintree, supra*, No. 2020-04, slip op. at 12 (Board not prohibited from enacting mitigation or other measures, such as signage, as conditions for permit).

Accordingly, the Board has failed to prove that the emergency access for the project—including access onto Dupee Street from High Plain Street, the width of Dupee Street, and alleged potential obstructions on Dupee Street—represents a valid local concern that outweighs the regional need for affordable housing.

B. Snow Storage and Removal

The Board claims that the project has inadequate storage space to move or store snow, especially with successive snow events. Board brief, p. 9. It relies in support on the same local provision upon which it relies for emergency access—the roadway width and length are inadequate because they do not meet the Town's subdivision rules and regulations design

standards, resulting in safety access issues, overcrowding, and snow removal problems. *See* Pre-Hearing Order IV.4.a, b. In its brief, the Board combines its argument on snow storage and removal with its argument on emergency access and its alleged issues with snow storage appear to result from concerns that accumulated snow and ice could potentially further impede emergency access.

Mr. Deschenes testified that the width of the proposed Dupee Street roadway will leave inadequate space to move heavily accumulating snow or safely store it once plowed, particularly with successive snow events. He claimed that significant snowbanks on the corner of Dupee Street and High Plain Road will present a hazard to motorists entering or exiting Dupee Street, and for vehicles traveling on High Plain Road while others are entering or exiting Dupee Street. He testified that accumulated snow or ice along the sides of Dupee Street will further narrow the roadway, exacerbating the potential hazard of inadequate or blocked access for emergency vehicles. In his view, significant amounts of accumulated snow are a common occurrence during winters in the region and present a substantial concern due to the density proposed for the project. Exh. 13, ¶¶ 12-13.

The Board argues the Town will be unable to enforce any illegal parking violations, or manage snow and ice accumulation, because this is a private way. Board brief, p. 9. The Board asserts the Committee has determined in another case that potential "road blockage from an accident or snow[is] sufficiently serious" to support a Board's denial. *See* Board brief, p. 11, citing *Lexington Woods, LLC. v. Waltham*, No. 2002-36, slip op. at 20 (Mass. Housing Appeals Comm. Feb. 1, 2005).

Ms. Morrison, a resident of Dupee Street, testified that turning onto High Plain Street from Dupee Street is already a challenge, and visibility will be negatively impacted by snow. Exh. 14, ¶ 5.

In response to Ms. Morrison's concerns about snowbanks impeding visibility on High Plain Street when exiting Dupee Street, Mr. Scully noted that snowbanks on High Plain Street are the responsibility of the Town, not the developer, as it is a public way, and any concerns about snow on High Plain Street should be managed by the Town. Exh. 12, ¶¶ 10, 16. Both Mr. Truax and Mr. Scully testified that it has been the Town's longstanding practice to plow Dupee Street. Exhs. 10, ¶ 25; 12, ¶ 10. Mr. Scully stated that, although Dupee Street is not a public way, the Town's engineering department has noted in a memorandum that nevertheless, the

Town plows and performs maintenance on the road. Exhs. 12, ¶ 10; 12-II. While the Town's DPW Memo stated that this would cease if the project was constructed, the Board's peer reviewer, Tetra Tech, noted in its Final Review memorandum that "reasonable options exist to address snow removal obligations," and recommended that any Board decision "include a condition that all snow removal be the responsibility of the development and that storage on the roadway or abutting property be precluded." Exhs. 12-III; 10-VII, pp. 3-4. Tetra Tech also noted that any Board decision could include a "condition clearly defining/limiting any ongoing town maintenance obligations," and recommended that the decision include such condition. Exh. 10-VII, p. 3. Mr. Scully noted the Town's department of public works found the cul-de-sac provides room for snow removal equipment to turn around, and there is space near visitor parking and between two buildings for some snow storage. *See* Exh. 12, ¶ 11, citing Exh. 12-VIII, p. 1; Exh. 2. He further noted the DPW Memo stated this layout was "practical" from a snow removal perspective. Exh. 12, ¶ 11. The DPW Memo, prepared following the submission of the site development plans revised through February 3, 2021, stated "[t]he current plan [with a cul-de-sac] is…by far the most acceptable version we have seen as there is now room for snow removal equipment to turn around. Furthermore, there is room beyond the visitor parking at the end of the drive as well as an opening…for some snow storage." Exh. 12-III. Mr. Truax testified that the project's revised plans show "adequate" areas for snow storage. Exh. 10, ¶ 25.He also referred to the Tetra Tech Final Review, which stated that "reasonable options exist to address snow removal obligations on tight sites" like Dupee Street. Exh. 10-VII, pp. 3-4.

The developer's experts, Mr. Truax and Mr. Scully, testified that the revised project plans included adequate provisions for snow storage onsite, and noted the Board's peer reviewers stated reasonable options were available to address any snow removal obligations. *See* Exh. 10, ¶ 25; Exh. 10-VII, p. 4; Exh. 12, ¶ 11; *see also* Exh. 2 ("Proposed Layout", "Landscape") (plans showing proposed parking, roadway width, and snow storage). Further, the developer has noted that any obstructions caused by snow on state Route 27, High Plain Street are not the responsibility of the developer as that roadway is not part of the project.

The Board's reliance on *Waltham, supra,* No. 2002-36, is misplaced. In that case, the potential for snow blockage alone was not deemed sufficiently serious to support a denial. As we have noted, we have approved narrow roads, serpentine roads, steep roads, and single access roads, but in *Waltham,* the *combination* of all of these elements constituted a sufficient health

and safety concern supporting a denial. *Waltham*, *supra,* No. 2002-36, slip op. at 20.[11] This project does not present a similar combination of multiple concerns. Instead, the Board has raised only the concern with the proposed width of Dupee Street and the risk alleged by the Board of obstructions from snow or street parking. The circumstance here is more like those in our recent decisions in *Braintree, supra,* No. 2020-04, slip op. at 12-13 (discussion of adequacy of 20-foot wide roadway and possible mitigation measures that prevent obstructions) and *Hingham, supra*, No. 2016-05, slip op. at 48 (discussion on how 20-foot wide roadway is adequate with on-street parking and snow storage prohibitions required). We conclude, therefore, that the Board has failed to show that issues relating to snow storage represent valid local concerns that outweigh the regional need for affordable housing.[12] Board brief, p. 9.

C. Open or Recreational Space

The Board argues the project does not have any meaningful open space or recreational opportunities for prospective residents. Board brief, p. 12. In its brief, the Board frames its argument as less concerned with recreational space and more with density. Board brief, p. 11. The Board argues it properly denied the project due to valid design and open space concerns.

Mr. Deschenes testified that the expectation of a playground or recreational space has to do with the concern of overcrowding the site and leaving future residents with minimal yard or open space. He stated because this site is close to Route 27, a heavily traveled roadway, residents will have no safe options for outside play except to drive off-site. Exh. 13, ¶¶ 16, 17. However,

---

[11] In *Waltham,* the Committee, in finding sufficient evidence of local concerns, stated "[t]he *combination* of the extreme steepness of the grade, the reverse curves, the narrow width of the roadway at the same portion of the road as the 10% grade, together with the lack of any other vehicular access to the development raise serious health and safety concerns, both in terms of roadway safety and emergency access….Although the Committee has approved narrow roads, or serpentine roads, or steep roads or even single access roads before, we find that the *combination* of these problematic elements leads to a health and safety concern that outweighs the regional need for affordable housing." *Waltham, supra*, No. 2002-36, slip op. at 20 (emphasis added).

[12] Although the developer lists parking and snow removal together as one issue on which it must establish a prima facie case, *see* Pre-Hearing Order § IV, ¶ 3, p. 5, parking and snow removal are separately listed as part of the Board's case on local concerns. *See* Pre-Hearing Order § IV, 4 3, p. 6. The Board's only parking concern raised in its brief relates to the asserted impact of potential on-street parking on Dupee Street on emergency vehicles access, which we addressed above in § VI.B. In any event, the Board did not sufficiently address parking adequacy as a separate local concern in its pre-filed testimony and provided no evidence of a parking deficit, as the developer notes. *See* Developer brief, pp. 30, 33. It therefore has not established a local concern that outweighs the need for affordable housing, Furthermore, by failing to brief the issue, the Board has waived it. *See* note 3, *supra.*

the Board argues that a "playground or formal recreational facility is not necessarily expected," *see* Board brief, p. 14, and Mr. Deschenes also testified "the expectation of a playground or …recreational facility at every 40B site is not the primary concern." Exh. 13, ¶ 16. Mr. Deschenes instead suggested the issue is one of overcrowding, testifying that the siting of eight single-family homes on a 1.22-acre lot leaves prospective residents with minimal to no yard space or open space in an already-condensed site. Exh. 13, ¶¶ 14, 16; Board brief, p. 14. He suggests that this is exacerbated by the fact that the project is "steps away from a heavily-traveled roadway—Route 27," so families will have no safe option for children playing outside. Exh. 13, ¶ 17.

The Board relies heavily on *Dennis Housing Corporation v. Dennis*, No. 2001-02 (Mass. Housing Appeals Comm. May 7, 2002), arguing that the project provides "significantly less open and recreational space" than the proposal at issue in *Dennis* where we upheld the denial of a comprehensive permit based on a finding that the open space was inadequate. Board brief, pp. 12-14. The Board contends that proximity to nearby open or recreational spaces does not adequately address the need for such space on a particular site. *Id*.; *see Dennis, supra,* No. 2001-02, slip op. at 10-12. It states the project does not have an adequate design for the site's particular density and narrow, small-acre site. Board brief, p. 12. In the Board's view, the Single Family Plan overcrowds the site, with almost zero percent of the lot reserved for open space, "meaningful" yard space, or any recreational amenities for the prospective tenants. Board brief, p. 13; Exh. 13, ¶ 19. The Board asserts it properly concluded that the proposed project "overutilized the site in an excessive and unnecessary manner." Board brief, p. 14.

The developer argues the Board's reliance on *Dennis* is misplaced, as *Dennis* involved application of specific Cape Cod Commission regulations and requirements.[13] It argues that here, the Board has provided no local requirements or regulations that apply to the project relating to open space, density or intensity, or project design and asserts that the witnesses' generalized concerns expressed in memoranda and non-expert testimony do not outweigh the developer's witness testimony that the design of the project is suitable for the surrounding area. Developer reply brief, pp. 3, 5; *see Braintree, supra*, No. 2020-04, slip op. at 28 (noting developer's

[13] The project at issue in *Dennis* was also a 50-unit apartment building as opposed to detached single-family homes. *See Dennis, supra*, No. 2001-02, slip op at 2.

witnesses testified project design suitable for surrounding area). Further, it argues its witnesses testified that recreational options are available nearby.

The developer also argues that the Board has not articulated with facts and evidence the local concern, as it relates to open or recreational space. *See* Board brief, pp.11-14; Developer reply brief, p. 4; *Lever Development, LLC v. West Boylston*, No. 2004-10, slip op. at 9 (Mass. Housing Appeals Comm. Dec. 10, 2007) (noting Board's evidence was lacking due to failing to identify local rule or regulation). The Board in the Pre-Hearing Order cited several provisions of the Town Zoning Bylaw relating to dimensional requirements, *e.g.,* minimum lot areas, front, rear, and side setbacks, and percentages of usable open space. *See* Pre-Hearing Order, § IV.4(c). However, it provided no argument on these specific zoning regulations in its brief. Additionally, although we recognize a zoning bylaw may require certain setback and other lot area minimums that result in different degrees of open space, the existence of such zoning provisions alone is not sufficient to outweigh the regional need for affordable housing. Although it listed these provisions in the Pre-Hearing Order, the Board has not provided argument on why these dimensional provisions, or any other local requirements or regulations require the denial of the developer's comprehensive permit, based on the project's alleged lack of open space and recreational amenities. In relying on a local requirement or regulation, such as the zoning bylaw, the Board must show "how the concerns set out in the local [bylaw] apply to the facts of this case" and "how the specific interests identified in the [Town] bylaw are important for this site." *See Scituate*, *supra,* No. 2007-15, slip op. at 26. Here, the Board failed to articulate how the local bylaw's dimensional requirements address a local concern for open and recreational space that is important, and relates in particular, to this site. Furthermore, it failed to present credible evidence demonstrating how the interests protected in the bylaw would be affected by the project.[14] *See Weston*, *supra,* No. 2017-14, slip op. at 16-19; *Scituate, supra*, No. 2007-15, slip op. at 26.

Therefore, based on the evidence, the Board has not shown that the design proposed is inappropriate for the surrounding area. *See Braintree,* No. 2020-04, slip op. at 28, citing *CMA,*

[14] More importantly, the purpose of Chapter 40B is to allow the overriding of restrictive local bylaws that prevent the construction of affordable housing. Lot size and setback requirements, present in local zoning throughout the Commonwealth are precisely the types of local provisions the Legislature envisioned overriding to permit construction under the comprehensive permit law. *See Hanover v. Housing Appeals Committee*, 363 Mass. 339, 355 (1973) (Committee has power to override local regulations, including zoning ordinances or by-laws, that are not consistent with local needs, under Chapter 40B).

Inc. v. Westborough, No. 1989-25, slip op. at 26 (Mass. Housing Appeals Comm. June 25, 1992) (noting importance of "whether the particular design [proposed] responds appropriately to the site itself and surrounding area"). The Board has not demonstrated a valid local concern with regard to open space that outweighs the need for affordable housing, particularly here, where the evidence shows there are other opportunities for outdoor space and recreation nearby. *See Braintree, supra*, No. 2020-04, slip op. 15 (noting multiple opportunities for recreation).

D. Compatibility with Neighborhood

As it did for open and recreational space, the Board refers to Zoning Bylaw §§ 5B-3.d.iii; iv; 6-B, and 6-C for its local concern regarding the compatibility of the project with the surrounding neighborhood. *See* Pre-Hearing Order, Section IV.4.d. These sections pertain to required buffers with adjacent lots, minimum lot area, setbacks and other dimensional regulations, and usable open space requirements. Mr. Deschenes testified that the number of proposed units overcrowds the site, as noted above, and is out of place with the existing long-standing neighborhood development pattern, to the detriment of abutters. He argues clear-cutting the site will adversely affect the residents of Victoria Circle, which abuts the site, destroy their privacy, and "dramatically affect" the existing surroundings and development pattern. Victoria Circle is a conventional cul-de-sac subdivision. Exh. 13, ¶¶ 14, 19. The Board argues, given the overcrowding issues, it properly concluded the proposed design overuses the site in an excessive and unnecessary manner, and the denial was based on valid local concerns. Board brief, p. 14.

The developer argues the Board has provided no local requirements, regulations, or standards that apply to the project relating to open space, density or intensity, or project design, as they relate to neighborhood compatibility. It argues there are no applicable bylaws protecting density or open space in this context. It claims that generalized concerns do not outweigh witness testimony, and the developer's witnesses have demonstrated that the design of the project is suitable for the surrounding area. Developer reply brief, pp. 2, 5 citing *Braintree, supra*, No. 2020-04, slip op. at 28. The developer argues "the plain facts reveal … single family development is the predominant development pattern in the neighborhood…." Developer brief, p. 35. Finally, it argues that although Mr. Deschenes testified that the project design will be a "detriment" to unnamed Dupee Street resident abutters, he did not identify any particular or specific harm. *Id.*

Although Mr. Deschenes' view seems to be based on the fact that the density of the proposed development is greater than that of the surrounding neighborhood, his statements that this type of development would be out of place with the existing long-standing development pattern of the neighborhood is not supported by the evidence of the surrounding areas. *See* Exh. 10, ¶¶ 6, 20 (testifying surrounding neighborhoods and most land in the surrounding vicinity "consist[s] primarily of single-family dwellings" and the neighborhood has "single-family character"); Exh. 11, ¶ 9 (testifying abutting neighborhoods are primarily single-family units).

As noted above in Section V.C, the Board cited in the Pre-Hearing Order the same dimensional zoning requirements for its local concern relating to neighborhood compatibility as it does for open and recreational space. As we noted above, the Board must show how the specific interests in the local regulation are important and relate to this site. *See White Barn Lane, LLC v. Norwell*, No. 2008-05, slip op. at 31 (Mass. Housing Appeals Comm. July 8, 2011), *aff'd* 99 Mass. App. Ct. 1123 (May 6, 2021) (Rule 23.0 decision), citing *Scituate supra*, No. 2007-15, slip op. at 26. Here again, the Board has not adequately demonstrated that local dimensional requirements are particularly important to maintain at this site. Accordingly, the Board has not articulated the local concern, nor shown its relationship to a specific applicable local requirement, as it relates to neighborhood compatibility. The purpose of Chapter 40B is in part to consider and allow the waiver of dimensional requirements that preclude the development of affordable housing, which typically is more dense housing than is allowed as of right. Here, that includes smaller lots and smaller setbacks, among other things. The Board has not proven specific ways in which the dimensions proposed here will harm either the new residents or the existing neighborhood.

Further, the Board made no argument specifically demonstrating a local concern relating to neighborhood compatibility, other than claims of alleged increased density and overcrowding. For example, the Board argues the project's dimensions are "relatively narrow," resulting in "density issues" and "overcrowding. Board brief, pp.5, 14. It argues the project is out of character with the surrounding neighborhood because it contains "significantly less density." Board brief, p.5. This argument suffers from the same weakness as the Board's open space argument in § V.C. The Board has not shown how the density and overcrowding concerns specifically apply to the facts of this case and why they are important for this site, in the context of the purpose of Chapter 40B. *See Scituate*, *supra,* No. 2007-15, slip op. at 26; *see also* note 14.

Therefore, it has not demonstrated a valid local concern that outweighs the need for regional affordable housing.

E. The Board Has Not Demonstrated Valid Local Concerns That Outweigh Regional Need for Affordable Housing

The Board suggests in its brief that the Town having achieved an approved Housing Production Plan (HPP) on April 25, 2019 should be considered in determining whether its asserted local concerns outweigh the need for affordable housing. It argues that the Town has "made significant progress toward encouraging affordable housing developments in the Town." Board brief, p. 15. It claims this support should weigh against the strength of the need for affordable housing. However, the Board provided no evidence to support its assertion regarding the status of an HPP. [15] Moreover, the relevant factor is not a town's support of affordable housing development, but rather whether there is a local concern that outweighs the regional need for affordable housing. *Zoning Bd. of Appeals of Lunenburg v. Housing Appeals Comm*., 464 Mass. 38, 42 (2013) (discussing requirement to consider need for affordable housing in region around municipality in which housing is proposed). *See Sunderland, supra*, No. 2008-02, slip op. at 6-8 (discussing regional affordable housing need analysis). The Board's argument, even if it had provided evidence, does not bear on the regional need for affordable housing.

"'Housing need' is effectively defined as 'the regional need for low and moderate income housing considered with the number of low income persons in the city of town or affected" pursuant to G.L. c. 40B, § 20. *Board of Appeals of Lunenburg v. Housing Appeals Comm*., 464 Mass. 38, 44 (2013). The Board has provided no evidence regarding the need for affordable housing in the applicable region. *See* 760 CMR 56.02 (identifying SHI and MSA as options available for assessing regional need for affordable housing). Moreover, failure to meet the statutory minima establishes a rebuttable presumption that a substantial regional housing need outweighs the local concerns in this instance. 760 CMR 56.07(3)(a); G.L. c. 40B, §§ 20, 23. *See Lunenburg*, 464 Mass. 38, 42 ("there is a rebuttable presumption that there is a substantial Housing Need which outweighs Local Concerns" if statutory minima are not met), quoting

[15] Even if the Board had also presented evidence regarding the regional need for housing, which it did not do, it refers in its brief to an April 25, 2019, approval of its HPP, but the HPP was not admitted as evidence or otherwise included as part of the record, and no evidence was presented regarding any certification by DHCD of the Town's compliance with the HPP. *See* Board brief, p. 15, citing Exh. 1, p. 4. Pursuant to 760 CMR 56.03(1)(b), a decision by a board to deny a comprehensive permit shall be upheld if EOHLC has certified the municipality's compliance with the goals of the Town's HPP.

Boothroyd v. Zoning Bd. of Appeals of Amherst, 449 Mass. 333, 340 (2007), quoting *Board of Hanover*, 363 Mass. 339, 367 ("municipality's failure to meet its minimum [affordable] housing obligations as defined in § 20 will provide compelling evidence that the regional need for housing does in fact outweigh the objections to the proposal").

Accordingly, the Board has not rebutted the significance of the regional need for affordable housing, and it has failed to demonstrate the Town has valid local concerns that outweigh the need for affordable housing on this basis as well.

VI. UNEQUAL TREATMENT

The developer also argues the Board's decision was not consistent with local needs under G.L. c. 40B, § 20 because the Board failed to apply its local requirements and regulations as equally as possible to subsidized and unsubsidized housing. G.L. c. 40B, §§ 20, 23; 760 CMR 56.07(2)(a)4; *Warren Place, LLC v. Quincy*, No. 2017-10, slip op. at 10-11 (Mass. Housing Appeals Comm. Aug. 17, 2018). The developer carries the burden of proving such unequal treatment. 760 CMR 56.07(2)(a)4. The Board may then attempt to rebut the developer's proof. *Braintree*, *supra,* No. 2020-04*,* slip op. at 30, citing *Avalon Cohasset, Inc. v. Cohasset*, No. 2005-09, slip op. at 8 (Mass. Housing Appeals Comm. Sept 18, 2007). A clear example of unequal treatment is if a condition is not based on a local legislative or regulatory requirement, but on concerns not previously regulated. *Braintree*, *supra*, No. 2020-04, slip op. at 30-31, citing *Haskins Way, LLC v. Middleborough*, No. 2009-08, slip op. at 13, n.14 (Mass. Housing Appeals Comm. March 28, 2011); *see also Green View Realty, LLC v. Holliston*, No. 2006-16, slip op. at 10 (Mass. Housing Appeals Comm. Jan 12, 2009); *Quincy, supra*, No. 2007-10, slip op at 3, 10.

The developer argues its project has been treated differently than other similar developments and is being held to standards not required of other developments in the Town. The developer submitted evidence regarding another development approved in Walpole at or around the same time as this project was under consideration.[16] The project at 173 High Plain Street was approved by special permit in 2022. Exhs. 10, ¶ 35; 11, ¶ 40; Developer brief, p. 21. It

[16] The developer also relied on a second development, Moose Hill Condominium, as receiving different treatment than Dupee Street. Exh. 10, ¶ 3; Board brief, p. 20. However, Moose Hill is a subsidized project developed under a comprehensive permit, and as such is not relevant to our consideration of whether a town's requirements and regulations are applied as equally as possible to both subsidized and unsubsidized housing." G.L. c. 40B, § 20.

has a similar number of units as the project at issue here, with eight units in one building with commercial space. It is located approximately 600 feet from Dupee Street. Exh. 11, ¶¶ 40, 40(a).

Mr. Scully was engaged as a traffic consultant for 173 High Plain Street. Mr. Truax also reviewed the details of the project. Exh. 10, ¶¶ 35, 40. Mr. Truax and Mr. Scully testified that 173 High Plain Street is located near (approximately 600 feet) Dupee Street, with access onto High Plain Street from the same side as the Dupee Street project via a single access road. Exhs. 10, ¶ 35; 11 ¶ 40(a). Both Mr. Truax and Mr. Scully testified that while emergency access for 173 High Plain Street was discussed in an engineering memorandum and a turning plan was submitted to the Board, this memorandum omitted any analysis regarding emergency access or egress by the Town's fire department ladder truck. Exhs. 10, ¶ 35(b); 11, ¶ 40(b). The memorandum focused only on smaller emergency vehicles and delivery or moving box trucks, unlike the Dupee Street project, where ladder truck access appeared to be the primary focus and reason for denial. Exhs. 10, ¶ 35(b); 11, ¶ 40(b). Mr. Scully and Mr. Truax also testified that the 173 High Plain Street truck turning plans show a modified hammerhead turnaround for emergency vehicles, as opposed to a circular turnaround that was required for the Dupee Street project. Exhs. 10, ¶ 35(c); 11, ¶ 40(b)-(c). A hammerhead turnaround was not supported for Dupee Street by the fire department, leading to the revised project plans showing a circular cul-de-sac. *Id*.

As for open space concerns, Mr. Truax also testified "there are no recreational amenities or open space on site" at 173 High Plain Street, similar to Dupee Street. Exh. 10, ¶ 35(d).

Mr. Deschenes testified that since the 173 High Plain Street project is located alongside High Plain Street and closer to that roadway, a fire ladder truck can easily access the building from that street. Exh. 13, ¶ 35(b). In order to access the residences on Dupee Street, Mr. Deschene testified a ladder truck must turn from High Plain Street onto Dupee Street for access. Therefore, he said, the turning radius for ladder trucks at 173 High Plain Street was not the same concern as it is with the project at issue here. *Id*.

Regarding the lack of open or recreational space requirements at High Plain Street, Mr. Deschenes testified that the "recreation and open space amenities" is a component of the Board's Comprehensive Permit Regulations and because the High Plain Street project is not a 40B project, it is not subject to those requirements. Exh. 13, ¶ 35(d).

The developer has shown that an unsubsidized development located approximately 600 feet from the project on the same street—173 High Plain Street—does not contain any requirements for outdoor recreational or open space. Mr. Deschenes testified the recreation and open space requirement, as a component of the Town's comprehensive permit regulations, is specifically required for subsidized projects, but these have not been offered as an exhibit or made part of the record. Requiring specific open space conditions for comprehensive permit projects while declining to do so for unsubsidized projects constitutes unequal treatment. *See Stoneham*, *supra,* No. 2014-10, slip op. at 84-85 (requiring an environmental impact analysis for a subsidized housing development, while declining to do so for unsubsidized projects constitutes unequal treatment). Therefore, the Board failed to treat the project as equally as possible as unsubsidized projects in violation of G.L. c. 40B, § 20 and 760 CMR 56.07(2)(a)(4).

VII. CONCLUSION

Based on a review of the entire record, and upon the findings of fact and discussion above, the Committee concludes that the decision of the Board is not consistent with local needs. The decision of the Board is vacated, and the Board is directed to issue a comprehensive permit that conforms to the developer's application and as provided in the text of this decision, and subject to the following conditions:

1. The comprehensive permit shall conform to the application submitted to the Board, as modified by the following conditions:

    a. The development shall be constructed as shown on the project plans prepared by GLM Engineering Consultants, Inc., titled "Site Development Plan A Comprehensive Permit M.G.L. c. 40B 'Diamond Hill Estates' Walpole, Massachusetts;" rev. through March 15, 2021, and Revision 1 to the project plans, dated December 8, 2021, subject to compliance with all applicable federal and state requirements. Exhs. 2, 3.

    b. The Board shall not include new, additional conditions.

    c. The developer shall comply with all applicable non-waived local requirements and regulations in effect on the date of developer's submission of its comprehensive permit application to the Board, consistent with this decision pursuant to 760 CMR 56.02: *Local Requirements and Regulations*.

    d. The developer shall submit final construction plans for all buildings, roadways, stormwater management systems, and other infrastructure to Walpole town entities, staff, or officials for final comprehensive permit review and approval pursuant to 760 CMR 56.05(10)(b).

e. The developer shall promptly submit to the Board copies of all formal and informal submissions by the developer to state and federal authorities with respect to formal or informal review and approval of construction and operation aspects of the project and proposed development, as well as all actions and decisions of those state and federal authorities made upon those submissions or otherwise in connection with this project. Issuance of a building permit will be subject to the developer's receipt of all applicable state and federal approvals required for the project.

f. All Walpole town staff, officials, and boards shall promptly take whatever steps are necessary to permit construction of the proposed housing in conformity with the standard permitting practices applied to unsubsidized housing in Walpole. Submission of plans and materials to the Town for review or approval shall be to the appropriate municipal official with relevant expertise to determine whether the submission is consistent with the final comprehensive permit, such determination shall be made in a reasonably expeditious manner, consistent with the timing for review of comparable submissions for unsubsidized projects, and approval shall not to be unreasonably withheld. *See* 760 CMR 56.07(6).

g. Any specific reference to the submission of materials to Walpole officials or offices for their review or approval shall mean submission to the appropriate municipal official with relevant expertise to determine whether the submission is consistent with the final comprehensive permit. Such official may consult with other officials or offices with relevant expertise as they deem necessary or appropriate.

2. Should the Board fail to carry out this order within thirty days, then, pursuant to G.L. c. 40B, § 23 and 760 CMR 56.07(6)(a), this decision shall for all purposes be deemed the action of the Board.

3. Because the Housing Appeals Committee has resolved only those issues germane to G.L. c. 40B, §§ 20-23 that were placed before it by the parties, the comprehensive permit shall be further subject to the following conditions:

a. Construction in all particulars shall be in accordance with all applicable local requirements and regulations in effect on the date of developer's submission of its comprehensive permit application to the Board, pursuant to 760 CMR 56.02: *Local Requirements and Regulations*, except those waived by this decision or in prior proceedings in this case.

b. The subsidizing agency may impose additional requirements for site and building design so long as they do not result in less protection of local concerns than provided in the original design or by conditions imposed by

the Board or this decision.

c. If anything in this decision should seem to permit the construction or operation of housing in accordance with standards less safe than the applicable building and site plan requirements of the subsidizing agency, the standards of such agency shall control.

d. No construction shall commence until detailed construction plans and specifications have been reviewed and have received final approval from the subsidizing agency, until such agency has granted or approved construction financing, and until subsidy funding for the project has been committed.

e. The Board and all other Walpole town staff, officials, and boards shall take whatever steps are necessary to ensure that a building permit and other permits are issued to the developer without undue delay, upon presentation of construction plans, pursuant to 760 CMR 56.05(10)(b), that conform to the comprehensive permit and the Massachusetts Uniform Building Code.

f. Design and construction shall be in compliance with the Massachusetts Environmental Protection Act (MEPA), G.L. 30, §§ 61-62H, and 760 CMR 56.07(5)(c). Construction shall not commence until the completion of the MEPA review process as evidenced by the issuance of a final certificate of compliance or other determination of compliance by the Secretary of Energy and Environmental Affairs. If applicable, the Committee retains authority to modify this decision based upon the findings or reports prepared in connection with MEPA.

g. Design and construction in all particulars shall be in compliance with all applicable state and federal requirements.

h. Construction and marketing in all particulars shall be in accordance with all applicable state and federal requirements, including without limitation, fair housing requirements.

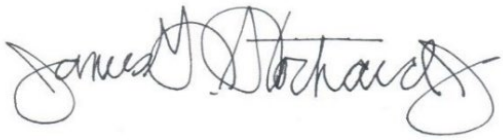
i. This comprehensive permit is subject to the cost certification requirements of 760 CMR 56.00 and guidelines issued pursuant thereto by the Executive Office of Housing and Livable Communities.

This decision may be reviewed in accordance with the provisions of G.L. c. 40B, § 22 and G.L. c. 30A by instituting an action in the Superior Court within 30 days of receipt of the decision.

HOUSING APPEALS COMMITTEE

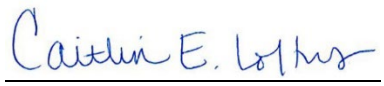
Shelagh A. Ellman-Pearl, Chair

Lionel G. Romain



James G. Stockard, Jr.

February 28, 2024



Caitlin E. Loftus, Presiding Officer